Supreme Court, U.S.
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No. 86-1814

In The
Supreme Court of the United States
October Term, 1986

THOMAS K. PINNER,

Petitioner,

VERSUS

JAMES J. SCHMIDT, THE SHERWIN-WILLIAMS CO., AND C.B.M. OF LOUISIANA, INC., d/b/a CREDIT BUREAU SERVICES-NEW ORLEANS,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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REASONS WHY PINNER'S APPLICATION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

The petitioner requested and elected to accept a substantial payment in satisfaction of his claims; consequently, he cannot now complain to this Court that he should receive more money. The case law of this Court and the

unanimity of the circuit courts make it clear that Pinner's application for certiorari should be promptly denied.

I. Pinner's Attempt to Question the Fifth Circuit's Denial of Punitive Damages is Precluded by his Acceptance of Full Payment of the Remittitur.

In his Petition for Certiorari, Pinner requests that this Court decide whether a plaintiff must prove malice and evil motive as a prerequisite to a finding of a willful failure to comply with the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* and for an award of punitive damages. It is difficult to understand how Pinner can urge such an argument in good conscience, without violating this Court's Rule 21.5, when the Fifth Circuit's decision to preclude punitive damages did not turn upon a finding of malice or evil motive. *Pinner v. Schmidt,* 805 F.2d 1258, 1263 (5th Cir. 1986). Pinner's statement that the Fifth Circuit held that "malice or evil motive need be found" to establish punitive damages is refuted by the language in the lower court's opinion.[1]

The Fifth Circuit properly ruled that an award of punitive damages was impermissible because Pinner did not present any evidence, much less prove, that Chilton

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[1] Aside from petitioner's illusionary reading of the Fifth Circuit's opinion, it is significant that the Fifth Circuit tracked the exact wording of section 1681n of the Fair Credit Reporting Act. The Court thus observed that "punitive damages are appropriate only where the violation is willful" and held there was "simply nothing to even suggest that Chilton willfully set out to do Pinner harm." *Pinner v. Schmidt, supra,* 805 F.2d at 1263. Recognizing that the district court judgment "lacked any evidentiary support whatsoever," the circuit court vacated the erroneous award of punitive damages. *Id.*

willfully failed to comply with the Fair Credit Reporting Act. While the Fifth Circuit concluded that the contents of Pinner's credit report were accurate, it inexplicably and erroneously chose to order a conditional remittitur regarding the compensatory damage award of $100,000.00 instead of vacating the compensatory damage award as the case law requires. The Fifth Circuit thus ordered a new trial on the issue of compensatory damages unless petitioner was willing to remit all compensatory damages in excess of $25,000.00. *See,* Petitioner's Appendix A, at A-21. Pinner then chose to accept the remittitur in lieu of a new trial. *See,* Petitioner's Appendix A, at A-61.

Pretermitting the correctitude of the lower court's preclusion of punitive damages, Pinner cannot now challenge the circuit court's decision. It is well-settled that a plaintiff may not appeal the propriety of a remittitur to which he has agreed. *Donovan v. Penn Shipping Co., Inc.*, 429 U.S. 648 (1977) (per curiam). A remittitur gives the plaintiff a choice. He can refuse to accept the reduced amount of damages and instead proceed to a new trial, or he can agree to accept a reduced amount. In this case, Pinner opted to accept the remittitur, and in exchange, he relinquished his right to question the Fifth Circuit's decision with respect to punitive damages.

In *Donovan v. Penn Shipping Co., Inc., supra,* this Court squarely addressed this precise issue and held that unconditional acceptance of a remittitur, as Pinner did below, prevents a litigant from attacking the revised judgment that he accepted. In *Donovan,* the petitioner sought appellate review of the district court's decision ordering a conditional remittitur, which the petitioner had accepted. On appeal, the petitioner requested the Second Circuit

Court of Appeals to "discard the settled rule that a plaintiff who accepted a remittitur may not appeal to seek reinstatement of the original verdict." *Donovan, supra,* 429 U.S. at 649. The Second Circuit Court of Appeals refused to discard this settled rule and dismissed the appeal. In a per curiam opinion reviewing the propriety of the Second Circuit's dismissal, this Court stated that "[t]he Court of Appeals properly followed our precedents in holding that a plaintiff cannot 'protest' a remittitur he has accepted in an attempt to open it to challenge on appeal." 429 U.S. at 649. Pinner did not even protest the remittitur; instead, he readily accepted it. However, it makes no difference whether the remittitur is accepted under protest. As expressed by this Court in *Donovan,* the jurisprudence "has firmly established that a plaintiff cannot appeal the propriety of a remittitur order to which he has agreed." *Id.* In short, this Court refused to disturb "the long standing rule that a plaintiff in federal court, whether prosecuting a state or federal cause of action, may not appeal from a remittitur order he has accepted." *Id.* at 650.

This Court's seminal decision in *Donovan, supra,* has been followed by numerous appellate and district courts, affirming the proposition that the acceptance of a conditional remittitur precludes a later challenge on appeal as to the validity of the remittitur order. *See, e.g., Lanier v. Sallas,* 777 F.2d 321 (5th Cir. 1986); *Higgins v. Smith Int'l, Inc.,* 716 F.2d 278 (5th Cir. 1983); *Call Carl, Inc. v. BP Oil Corp.,* 554 F.2d 623 (4th Cir.), *cert. denied,* 434 U.S. 923 (1977); *Ohio-Sealy Mattress Manufacturing Co. v. Sealy, Inc.,* 669 F.2d 490 (7th Cir. 1982), *cert. denied,* 459 U.S. 943 (1982).

In this case, Pinner accepted, without reservation, the remittitur of $25,000.00 in lieu of a new trial. Pinner now attempts to challenge the propriety of the conditional remittitur, after he requested and received payment of the revised judgment. Pinner cannot double-dip. Under the jurisprudential authority of this Court, as set forth in *Donovan* and its progeny, Pinner's acceptance of the remittitur precludes him from challenging *any* aspect of that order on appeal.[2]

A situation very much like the case *sub judice* was presented in *Lanier v. Sallas, supra.* In *Lanier,* plaintiff questioned the refusal of the trial court to submit the issue of punitive damages to the jury. In the district court, the plaintiff accepted a remittitur reducing her compensatory damage award for medical malpractice to $50,000.00. The defendants appealed the judgment and the plaintiff cross-appealed the district court's refusal to submit her claim for punitive damages to the jury. In its opinion, the Fifth Circuit ruled that under *Donovan* a plaintiff cannot challenge the propriety of a remittitur order to which he has agreed. While a narrow exception to this tenet allows a plaintiff to accept a remittitur but reserve his right to appeal with respect to an entirely separate and distinct

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[2] Pinner's acceptance of the conditional remittitur, of course, has no effect on Chilton's right to appeal. As stated in *Higgins v. Schmidt International, Inc., supra,* "*Donovan* does not diminish the defendant's right to appeal a judgment after winning a remittitur." 716 F.2d at 282 n.1. *Accord, Westerman v. Sears, Roebuck & Co.,* 577 F.2d 873 (5th Cir. 1978); *Viestenz v. Fleming Companies, Inc.,* 681 F.2d 669, 702 (10th Cir. 1982), *cert. denied,* 459 U.S. 972 (1982); *Caiazzo v. Volkewagenwerk A.G.,* 468 F. Supp. 593, 607 (E.D.N.Y. 1979), *affirmed in part and reversed in part on other grounds,* 647 F.2d 241 (2d Cir. 1981).

cause of action, the Fifth Circuit, as well as other circuits, uniformly have held that a claim for punitive damages is simply not separate and distinct from a claim for compensatory damages. As stated by the Fifth Circuit in *Lanier v. Sallas, supra,* in order to recover punitive damages, the plaintiff would have to prove every element of her cause of action for compensatory damages. 777 F.2d at 325. In pertinent language, the Fifth Circuit succinctly stated, "[w]hether pleaded in a single count or separately, the punitive damage claim is dependent on establishing liability for compensatory damages and, in addition, establishing malice or some other aggravated circumstance." *Lanier v. Sallas,* 777 F.2d at 325-326.

In the instant case, Pinner's claims against Chilton were predicated upon alleged violations of the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* Pinner's cause of action against Chilton was based on a single cause of action, namely, the Fair Credit Reporting Act. While Pinner sought compensatory and punitive damages under the Fair Credit Reporting Act, the fact remains that Pinner's punitive damage claim is not separate and distinct from his compensatory damage claim. To the contrary, in order to recover punitive damages under the Fair Credit Reporting Act, Pinner would have to prove every element of his claim for compensatory damage under the FCRA for negligence and also prove willfulness. Consequently, Pinner's quick and unqualified acceptance of the remittitur of $25,000.00 in compensatory damages bars Pinner from attacking the Fifth Circuit's ruling via certiorari review on his punitive damage claim.

In sum, Chilton respectfully submits that, as in *Lanier v. Sallas, supra,* Pinner's claim for punitive damages under

the Fair Credit Reporting Act is "inextricably intertwined with the claim for compensatory damages, and, consequently . . . [Pinner's] acceptance of a remittitur bars [his] appeal of the [Fifth Circuit's] action on the punitive damage claim." *Id.* at 322. By electing to accept the remittitur of $25,000.00 as a compensatory damage award in lieu of a new trial, Pinner waived his right to appeal the Fifth Circuit's action on his punitive damage claim and, therefore, Pinner's request for certiorari review of the Fifth Circuit's action on his punitive damage claim should and must be denied.

II. A Writ of Certiorari Should Not Issue to Increase Pinner's Attorney's Fees.

In his Petition, Pinner seeks review of whether the award of $27,400.00 in attorney's fees (to compensate him for obtaining a $25,000 verdict on behalf of his client/son) should be increased. But this question is not properly before the Court. Moreover, this question fails to indicate the character of reasons which merit consideration for certiorari review, as set forth in Rule 17 of the Rules of this Court.

The Fifth Circuit determined that any award of attorney's fees would be carried with the case. *See* Chilton's Appendix A, *infra.* In its opinion, the Fifth Circuit resolved the issue by concluding that the attorney's fee award against Chilton, as generously assessed by the district court, would remain. 805 F.2d at 1266. A judgment incorporating the Court's award of attorney's fees was entered on April 3, 1987. *See,* Petitioner's Appendix A, at A-62.

When the final judgment was entered in this case, (and paid shortly afterwards), Pinner did not contest the amount of attorney's fees awarded. In fact, Pinner agreed as to all amounts to be awarded in the judgment, including not only the conditional remittitur, but also the amount of attorney's fees. *See,* Petitioner's Appendix A, at A-61. Pursuant to Pinner's request for the amounts to be awarded in the judgment and his unqualified acceptance of these amounts (*see,* Petitioner's Appendix A, at A-61), the district court entered judgment in Pinner's favor. This judgment consisted of $25,000.00 in compensatory damages derived from the conditional remittitur, court costs, accumulated interest, and $27,400.00 of attorney's fees. This judgment was signed and entered by the district judge on April 3, 1987. Pinner unconditionally accepted the benefits of this judgment, signed a satisfaction of judgment to that effect, and was paid $62,590.76. *See,* Satisfaction of Judgment as set forth in Chilton's Appendix B, *infra.* In view of the Fifth Circuit's decision and Pinner's election to accept Chilton's payment for all of his attorney's fees, Chilton submits that it is too late for Pinner to seek an increase in the award of attorney's fees.

Pinner failed to contest the amount of attorney's fees awarded when the final judgment was entered. He subsequently signed a satisfaction of judgment, which did not reserve that right. As the result of his own deliberate conduct, Pinner cannot seek to increase the circuit court's

assessment of attorney's fees through the instant petition for certiorari.

The satisfaction of judgment (Appendix B, *infra*) reveals that Pinner did not reserve a right to seek an increase in the award of attorney's fees, nor did he contest the amount awarded by the judgment. Indeed, even after the instant case was remanded to the district court, Pinner emphatically agreed as to *all* amounts to be awarded in the amended judgment, including the award of attorney's fees. *See,* Petitioner's Appendix A, at A-61. Pinner's unqualified acceptance of the benefits of the judgment, including the award of $27,400.00 of attorney's fees, precludes him from contending that the amount of attorney's fees was inadequate. Pinner chose not to question the award of attorney's fees nor did he reserve the right to attack the amount of attorney's fees before entry of final judgment in the courts below. Any right Pinner had to seek attorney's fees for work done in the appellate court was relinquished not only by his failure to contest the amount of attorney's fees awarded by the lower courts, but also by his subsequent execution of a satisfaction of judgment which did not reserve that right. Pinner's belated request for additional attorney's fees does not approach, much less cross, the threshold calling for an exercise of this Court's power of supervision, as set forth in Rule 17 of the Rules of this Court.

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CONCLUSION

For the foregong reasons, Chilton respectfully submits that the Petition for Writ of Certiorari filed by petitioner Pinner should and must be denied.

Respectfully submitted,

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Attorney for Respondent, Credit Bureau Services - New Orleans, d/b/a Chilton Corporation

———o———

CERTIFICATE OF SERVICE

I hereby certify that I have on this 5th day of June, 1987, served three copies of the foregoing brief in opposition upon the folowing, by placing same in the United States mail, properly addressed and first class postage prepaid:

(1) Counsel for Petitioner,
Edward K. Pinner, Sr., Esq.
511 Audubon Building
New Orleans, Louisiana 70112

(2) Counsel for Sherwin-Williams Company and James J. Schmidt,
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704 Carondelet Street
New Orleans, Louisiana 70130

HARRY A. ROSENBERG

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-3524

THOMAS K. PINNER,

Plaintiff-Appellee-
Cross-Appellant,

versus

JAMES J. SCHMIDT, THE SHERWIN-WILLIAMS COMPANY and CREDIT BUREAU SERVICES-NEW ORLEANS, d/b/a CHILTON CORPORATION, etc., et al

Defendants-Appellants-
Cross-Appellees.

Appeal from the United States District Court for the
Eastern District of Louisiana

(Filed June 2, 1986)

Before POLITZ, GARWOOD and JOLLY, Circuit Judges.

BY THE COURT

IT IS ORDERED that the motion of the appellee-cross-appellant to place this case on the summary calendar is DENIED.

IT IS FURTHER ORDERED that the motion of the appellee-cross-appellant for attorney fees for work done in appellate court, and the motion of the appellee-cross-appellant for damages for delay and double costs, are each and both carried with the case.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

THOMAS K. PINNER	*	
	*	
VERSUS	*	CIVIL ACTION
	*	
JAMES J. SCHMIDT, THE SHERWIN-WILLIAMS COMPANY, AND C.B.M. OF LOUISIANA, INC., D/B/A CREDIT BUREAU SERVICES-NEW ORLEANS, A/K/A CHILTON CORPORATION	*	NO. 84-2059
	*	SECTION "A"
	*	MAG. DIV. 3

SATISFACTION OF JUDGMENT

(Received April 6, 1987)

TO: Ms. Loretta G. Whyte
Clerk of Court
United States District Court
Eastern District of Louisiana
United States Courthouse
500 Camp Street
New Orleans, Louisiana 70130

NOW INTO COURT, through undersigned counsel, comes plaintiff, Thomas K. Pinner, who certifies to the Court that the Judgment rendered herein on April 3, 1987, in favor of plaintiff has been paid in full by Chilton Corporation and undersigned counsel does hereby authorize the Clerk of Court to note "Judgment Satisfied" on the docket sheet as provided in Rule 19.3 of the Local Rules for the Eastern District of Louisiana.

New Orleans, Louisiana, this 6th day of April, 1987.

Respectfully submitted,

/s/ Edward K. Pinner, Sr.
EDWARD PINNER
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New Orleans, Louisiana 70112
Telephone: (504) 522-2414

ATTORNEY FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that I have on this 6th day of April, 1987, served a copy of the foregoing pleading upon counsel for defendant, Chilton Corporation, by hand delivery.

/s/ Edward K. Pinner, Sr.